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17 UNITED STATES DISTRICT COURT
18
19 NORTHERN DISTRICT OF CALIFORNIA
20

21 Jeremy Stanfield, Romonia Persand, and
22 Shabnam Sheila Dehdashtian, individually, on
23 behalf of all others similarly situated, and on
24 behalf of the general public,

25 Plaintiffs,

26 v.

27 First NLC Financial Services, LLC, and
28 DOES 1 through 50 inclusive,

Defendants.

Case No. C 06-3892 SBA

**DEFENDANT FIRST NLC
FINANCIAL SERVICES, LLC'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
FIRST NLC'S PROPOSED NOTICE
TO THE CLASS**

1 Defendant First NLC Financial Services, LLC (“First NLC”) submits this brief in support
2 of its proposed notice to the class, attached hereto as Exhibit A.

3 **I. SUMMARY OF MEET AND CONFER**

4 The parties exchanged meet and confer written communications well-within the court-
5 ordered time period.¹ The parties were able to agree on most of the content of the notice to the
6 putative class members, but reached impasse on four sentences that First NLC contends should be
7 included within the notice. Below, First NLC sets forth the information that should be included
8 in the notice and its rationale for including it.

9 **II. FIRST NLC’S PROPOSED INFORMATION FOR THE NOTICE TO THE CLASS.**

10 While the Proposed Notice in this case is merely a facilitated notice and this matter has
11 not been certified as a class action, courts – including this Court – look to Federal Rule of Civil
12 Procedure 23 for guidance. *See Veliz v. Cintas Corp.*, Case No. C 03-1180 SBA, Docket No. 151,
13 p. 3, lines 3-5. “Rule 23 contemplates that putative class members will make an
14 informed decision about their decision to opt out of a class.” *In re McKesson HBOC, Inc. Secs.*
15 *Litig.*, 126 F. Supp. 2d 1239, 1243 (N.D. Cal. 2000). The same is true for collective actions –
16 class members should have complete and accurate information so that they can make an informed
17

18 ¹ Plaintiffs’ allegation that defendant or its counsel have improperly delayed in this lawsuit is false.
19 While it is certainly not worth this Court’s time to get involved in petty squabbles and finger pointing
20 between the parties, First NLC feels obliged not to allow plaintiffs’ incorrect and inflammatory
21 accusations go unanswered. To set the record straight, the Court’s November 1, 2006 order required the
22 parties to meet regarding the notice within 10 days of the order. Under Federal Rule of Civil Procedure 6,
23 the due date was November 16, 2006. Because of their full business and trial calendars, Defendants’
24 counsel were unavailable for a meeting through November 10, but requested that plaintiffs’ counsel
25 schedule a conference call on November 13 or 14 so that Defendant’s counsel could be prepared to talk
26 about, and focused on, the important substantive issues regarding the notice. For some reason, plaintiffs’
27 counsel refused to schedule a conference call – a common professional courtesy – and, instead, constantly
28 tried to cold call Defendant’s counsel to force Defendant’s counsel into a discussion when Defendant’s
counsel were not ready or in the middle of other pressing business. Ultimately, the parties exchanged
written communications during the week of November 13 instead of engaging in a phone conference.
With respect to the list of class members, Defendant is in the process of putting this list together and
expects to be able to transmit it to plaintiffs’ counsel shortly. Although plaintiffs seems to think that this
information is easily compiled, it takes time, particularly because it is important that the information is
accurate. Plaintiffs’ constant threats of motions and sanctions when First NLC cannot meet Plaintiffs’
unreasonable demands and deadlines will not make the class member list materialize any sooner nor will it
help the parties’ future cooperative relationship.

1 decision to consent to the class. The following sentences should be included in the notice to
2 ensure that class members make informed decisions:

3
4 **Proposed Sentence at page 3, lines 9-12.**

5 “Should the lawsuit not succeed, however, any person who joined the lawsuit may be
6 collectively and/or proportionately liable to reimburse First NLC for its costs of suit – such as
7 filing fees or deposition transcripts – and/or First NLC’s attorneys’ fees.”

8 **Rationale**

9 Courts award costs to prevailing defendants in FLSA suits. *See* Fed. Rule Civ. Proc.
10 54(d); *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190-91 (10th Cir. 2004) (awarding
11 costs to prevailing defendant employer in FLSA suit). Although the FLSA does not expressly
12 provide for it, courts may also award attorneys’ fees to prevailing defendants. *See EEOC v.*
13 *Complete Dewatering*, 16 F. Supp. 2d 1362, 1368-69 (S.D. Fla. 1998) (“in cases brought pursuant
14 to the ADEA or FLSA, courts have applied the common law to prevailing defendants, allowing
15 them to recover only if the plaintiff acted in bad faith.”); *Kreager v. Solomon & Flanagan, P.A.*,
16 775 F.2d 1541, 1542-43 (11th Cir. 1985) (holding that the common law applies to claims by
17 prevailing defendants for attorney’s fees in FLSA actions). First NLC is not aware of any reason
18 why it may not recover its costs and, potentially, its attorneys’ fees should it prevail. Class
19 members have a right to know this information before consenting to the lawsuit.

20
21 **Proposed Sentence at page 3, lines 16-19.**

22 “If you file a “Plaintiff Consent Form” your continued right to participate in this action
23 will depend upon a later decision by the Court that you and the named Plaintiffs are “similarly
24 situated” in accordance with applicable laws, and that it is appropriate for this case to proceed as
25 a collective action.”

26 **Rationale**

27 This is a plain statement of the collective action process. *See Leuthold v. Destination*
28 *America, Inc.*, 224 F.R.D. 462, 466-67 (N.D. Cal. 2004) (“should the court determine on the basis

1 of the complete factual record that the plaintiffs are not similarly situated, then the court may
2 decertify the class and dismiss the opt-in plaintiffs without prejudice.”). Class members have a
3 right to be fully informed about their decision to consent to this lawsuit, which includes
4 understanding that the class may be decertified and dismissed by the Court. Although the
5 substance of this sentence may be contained in other parts of the notice, First NLC’s proposed
6 notice includes this sentence under the heading “**EFFECT OF JOINING OR NOT JOINING**
7 **THIS LAWSUIT**” to ensure that class members clearly understand this point.

8
9 **Proposed Sentence at page 4, lines 19-21.**

10 “The representative plaintiffs and class counsel will make key decisions concerning the
11 litigation, the method and manner of conducting this litigation, and all other matters pertaining to
12 this lawsuit. These decisions will be binding upon you, unless you object.”

13 **Rationale**

14 This is a true statement about the relationship between class counsel and class members.
15 In fact, the court in *Belt v. Emcare Inc.*, 299 F. Supp. 2d 664, 672 (E.D. Tex. 2003) approved a
16 substantially similar version of this sentence. Indeed, it is commonly recognized that class or
17 collective action attorneys have “nearly plenary control over all important decisions in the lawsuit
18 because of the absence of monitoring by clients.” *In re Thirteen Appeals Arising Out of The San*
19 *Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d 295, 310 (1st Cir. 1995) (internal citations and
20 quotations omitted). In class or collective actions, “counsel and not the parties themselves plays
21 the leading role. It is counsel who judges the calculus for success of the litigation and who
22 decides whether or not to sue. It is counsel who advances the cost of the litigation, makes the
23 settlement decisions, and, in turn, who usually derives the largest financial benefit from the
24 settlement.” *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 570-71 (E.D.
25 Penn. 2001); *see also Malchman v. Davis*, 588 F. Supp. 1047, 1058 (S.D.N.Y. 1984) (“It is, of
26 course, a matter of common experience in class actions that the named plaintiffs are often people
27 of very little sophistication in financial or legal matters. It is almost always the attorneys who
28 make the litigation decisions, determine strategy, and negotiate settlement terms.”) “Even where

1 an individual class member is aware of pending litigation, it is far from clear that she could have
2 much influence on the class attorney because the attorney must act for the benefit of the class as a
3 whole and therefore is not obliged to follow the unilateral wishes of any individual class member
4 when those wishes deviate from the attorney's sense of optimal litigation strategy." Jonathan R.
5 Macey and Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative*
6 *Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 20 (1991)
7 (cited in *In re Oracle Sec. Litig.*, 136 F.R.D. 639, *passim* (N.D. Cal. 1991))

8 Here, putative class members have a right to know and understand the role of class
9 counsel and understand their relationship with counsel before consenting to join the collective
10 action. This includes understanding that key decisions made by representative plaintiffs and class
11 counsel may be binding on them.

12 Plaintiffs claim that the foregoing sentence should not be added because it may "frighten"
13 putative class members. First NLC disagrees that there is anything "frightening" about this
14 information or that it should cause the class members any trepidation. It is simply an informative
15 statement. Assuming this information could "frighten" putative class members, it is for that
16 reason that they should be told about it. The purpose of notice to the class is not simply to
17 explain to putative class members the potential benefits of consenting to the lawsuit, but also to
18 tell them about possible negative consequences. Assuming this information could be interpreted
19 as negative, class members have a right to know it before consenting.

20 Accordingly, the foregoing sentence – or an equivalent version – should be included in the
21 notice to class members. First NLC asked plaintiffs to propose an alternative sentence, but they
22 refused.

23
24 **Proposed Sentence at page 4, lines 23-26.**

25 "If there is a recovery, Plaintiffs' attorneys will receive a part of any settlement obtained
26 or money judgment entered in favor of all members of the class, which would proportionately
27 reduce the award that each class member would receive."

1 **Rationale**

2 Plaintiffs do not dispute that this information is accurate. Indeed, they admit that they
3 are taking this case on a contingency fee basis. Putative class members – or, for that matter, any
4 of plaintiffs’ counsel’s clients – have a right to understand that, if there is a recovery in this
5 lawsuit, each person’s recovery will be proportionately reduced by plaintiffs’ attorneys’ fee
6 award. This is one of the more important considerations for the class members, and it should be
7 made clear.

8 **III. CONCLUSION**

9 For the foregoing reasons, First NLC requests that the Court adopt its proposed notice to
10 the class, attached hereto as Exhibit A.

11 Dated: November 21, 2006

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15 By: _____/s/_____
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17 Attorneys for Defendant
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